

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SCOTT ANDERSON,

Plaintiff,

PACIFIC CRANE MAINTENANCE  
COMPANY, L.P.,

Defendant.

CASE NO. 3:16-cv-05825-RJB

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

This matter comes before the Court on Defendant Pacific Crane's Motion to Dismiss.

Dkt. 10. The Court has considered Plaintiff's Response (Dkt. 12), Defendant Pacific Crane's Reply (Dkt. 14), and the remainder of the file herein.

I.

#### A. Alleged facts.

The Complaint alleges the following facts.

Plaintiff has worked for Defendant Pacific Crane for over 11 years, and until January 6, 2016, Plaintiff was employed in the “Lead” position in the Crane Shop at Pierce County Terminal in the

1 Port of Tacoma. While in that position, on September 16, 2016, Plaintiff informed a state safety  
2 inspector from the Division of Occupational Safety and Health that a component on some cranes  
3 needed repair. The cranes were ‘red-flagged’ by the safety inspector and removed from general use.  
4 Dkt. 1-1 at 3, 4.

5 Over the next several months, Plaintiff’s union confronted Defendant Pacific Crane about the  
6 safety issues initially raised by Plaintiff to the state safety inspector, including a threat by the union  
7 to stop work until repairs were made. Defendant Pacific Crane then “embarked on a course of actions  
8 that affected the terms and conditions of employment,” including: (1) filing unfounded complaints  
9 (later dismissed by the Joint Port Labor Relations Committee) for: leaving work to attend a meeting  
10 with management and the union, not reporting down time, not reporting equipment damage, and not  
11 properly calling in sick; (2) removing Plaintiff from the Lead position; (3) denying Plaintiff a transfer  
12 from a more desirable night shift position in May 2016; and (4) denying Plaintiff from acting as a  
13 “back-up lead;” and (5) filing a meritless complaint against Plaintiff for failing to report an injury.

14 Dkt. 1-1 at 3, 4.

15 Plaintiff has been forced to leave the workplace due to the “stress of the constant retaliation,”  
16 which has the potential to deter other employees from reporting unsafe workplace conditions.  
17 Plaintiff has filed a complaint against Defendant Pacific Crane with DOSH, which determined not to  
18 pursue a complaint on Plaintiff’s behalf. Dkt. 1-1 at 4.

19 **B. Claims.**

20 The Complaint alleges two claims: violations of the Washington Industrial Safety and  
21 Health Act, RCW 49.17. *et seq.*, and unlawful termination in violation of public policy. Dkt. 1-1  
22 at ¶¶16-21.

23 **C. Motion to Dismiss.**

1 Defendant Pacific Crane argues that dismissal is appropriate because (1) both claims are  
2 governed by a collective bargaining agreement and are pre-empted by Section 301 of the Labor  
3 Management Relations Act (LMRA), 29 U.S.C. 185(a), and (2) Plaintiff has not exhausted  
4 mandatory grievance procedures required by said collective bargaining agreement. Dkt. 12 at 4-  
5 6. Defendant Pacific Crane has abandoned a third argument, which need not be addressed. Dkt.  
6 14 at FN1. *See* Dkt. 10 at 6, 7.

II.

8 Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where a complaint fails to allege a  
9 cognizable legal theory or sufficient facts to state a claim upon which relief can be granted.  
10 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
11 allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires  
12 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
13 will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(internal citations  
14 omitted). “Factual allegations must be enough to raise a right to relief above the speculative  
15 level, on the assumption that all the allegations in the complaint are true (even if doubtful in  
16 fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to relief that is plausible  
17 on its face.” *Id.* at 1974.

18 An exception to the general “well-pleaded rule” is the “complete preemption doctrine,”  
19 which acknowledges that “the preemptive force of some statutes is so strong that they completely  
20 preempt an area of state law.” *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9<sup>th</sup> Cir. 2003). When this  
21 doctrine applies, “any claim based on preempted state law is considered to arise under federal  
22 law.” *Id.* “A state law claim is completely preempted by [§ 301 of the LMRA] when it  
23 necessarily requires the court to interpret an existing provision of a [collective bargaining

1 agreement] that can reasonably be said to be relevant to the resolution of the dispute.” *Id.*,  
 2 quoting *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 693 (9<sup>th</sup> Cir. 2001).

3 **III.**

4 **A. State law claims preempted by § 301?**

5 “The plaintiff’s claim is the touchstone for this analysis; the need to interpret the CBA  
 6 must inhere in the nature of the plaintiff’s claim.” *Cramer*, 255 F.3d at 691. Analyzing the claims  
 7 in light of the *Cramer* standard, the Court concludes that § 301 should not preempt Plaintiff’s  
 8 state law claims.

9 The first claim alleges violations of the Washington Industrial Safety and Health Act,  
 10 including RCW 49.17.060, which requires employers to “furnish . . . a place of employment free  
 11 from recognized hazards that are causing or likely to cause serious injury or death[.]” The  
 12 alleged theory appears to be that Defendant Pacific Crane reneged on its workplace safety  
 13 obligations by failing to repair or remove faulty equipment. Such conduct, if true, would violate  
 14 a state statute that should not be negotiated away by a collective bargaining agreement. *See*  
 15 *Livadas v. Bradshaw*, 512 U.S. 107, 123 (“Section 301 cannot be read broadly to preempt  
 16 nonnegotiable rights conferred on individual employees as a matter of state law”); *Humble v.*  
 17 *Boeing Co.*, 305 F.3d 1004 FN (9th Cir. 2002) (“We view a state duty as “negotiable” if it is only  
 18 a default rule around which the parties may contract, or if the existence of a breach of the duty  
 19 under state law might be tempered or nullified by agreement of the parties.)

20 Even if state law workplace safety obligations could be negotiated away, Defendant  
 21 Pacific Crane has not shown that the collective bargaining agreement is intertwined with the  
 22 claim. Defendant Pacific Crane points to specific provisions of the agreement that it argues need  
 23 interpretation, *See* Dkt. 10 at 4-6, but the mere overlap between alleged facts and content found  
 24

1 in the agreement is insufficient to extinguish Plaintiff's claim. The "proffered interpretation  
 2 argument must reach a reasonable level of credibility," *Cramer*, 255 F.3d at 692, which is not the  
 3 case.

4 Defendant Pacific Crane's argument fares no better as to the second claim, which alleges  
 5 wrongful termination in violation of public policy. Termination "in retaliation for reporting  
 6 employer misconduct, i.e., whistle-blowing," *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d  
 7 268, 287 (2015), is a well-established cause of action under Washington law. The Complaint  
 8 appears to allege that Plaintiff's reporting of unsafe equipment to the state safety inspector  
 9 instigated retaliatory steps by Defendant Pacific Crane that culminated in termination. Again, the  
 10 Court does not find that litigating the claim will require interpretation of the collective  
 11 bargaining agreement. The fact that factual allegations may implicate terms of the collective  
 12 bargaining agreement, for example, when Defendant Pacific Crane removed Plaintiff from a  
 13 Lead position or gave him less desirable work assignments, is not enough to find that the  
 14 collective bargaining agreement need be interpreted. The fact that the agreement is helpful to  
 15 determining damages is also not enough, because "the bare fact that a collective-bargaining  
 16 agreement will be consulted for damage computation is no reason to extinguish the state-law  
 17 claim." *Livadas v. Bradshaw*, 512 U.S. 107, 108, 124. *See also, Lingle v. Norge Div. of Magic*  
 18 *Chef, Inc.*, 486 U.S. 399, 412, n. 12 ("A collective-bargaining agreement may, of course, contain  
 19 information such as rate of pay . . . that might be helpful in determining the damages").

20 In sum, interpreting the collective bargaining agreement is not relevant to resolving  
 21 Plaintiff's claims. The agreement is peripheral to the claims, which are "clearly based on state  
 22 law." *Cramer*, 255 F.3d at 692. Defendant Pacific Crane's motion should be denied because §  
 23 301 does not preempt either one of Plaintiff's state law claims.

24

B. Exhaustion of administrative remedies properly pled?

2 Defendant Pacific Crane argues that “where interpretation of a [collective bargaining  
3 agreement] is required in order to adjudicate Plaintiff’s state law claim, it is well-established that  
4 an employee seeking to vindicate personal rights under a [collective bargaining agreement] must  
5 first attempt to exhaust any mandatory grievance procedure provided” by that agreement. Dkt. 10  
6 at 6. However, as discussed above, interpretation of the collective bargaining agreement is not  
7 required to resolve Plaintiff’s state law claims. Dismissal for failure to allege exhaustion of  
8 administrative remedies is not warranted. Specific to Plaintiff’s state law claim for wrongful  
9 termination in violation of public policy, dismissal for failure to exhaust administrative remedies  
10 “ignores the fundamental distinction between a wrongful discharge action based in tort and an  
11 action based upon an alleged violation of an employment contract or [collective bargaining  
12 agreement].” *Smith v. Bates Technical College*, 139 Wn.2d 793, 809 (2000). Therefore,  
13 dismissing Plaintiff’s claim for failing to *allege* exhaustion would be improper. *See id.*

14 The Complaint should not be dismissed for failure to exhaust administrative  
15 remedies.

16 Therefore, it is HEREBY ORDERED that Defendant Pacific Crane's Motion to Dismiss  
17 (Dkt. 10) is DENIED.

18 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
19 to any party appearing *pro se* at said party's last known address.

20 || Dated this 23<sup>rd</sup> day of November, 2016.

Robert G. Bryan

ROBERT J. BRYAN  
United States District Judge